



Virginia
Regulatory
Town Hall

Final Regulation Agency Background Document

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| Agency Name: | Board of Medicine, Department of Health Professions |
| VAC Chapter Number: | 18 VAC 85-80-10 et seq. |
| Regulation Title: | Regulations Governing the Practice of Occupational Therapy |
| Action Title: | Periodic review – supervision of unlicensed persons |
| Date: | 8/4/02 |

Please refer to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99) , and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the final regulatory action package.

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published.

The board has adopted amendments to its regulations for the licensure of occupational therapists in order to address concerns about the adequacy of supervision for unlicensed assistants and to provide greater clarity about practice by graduates waiting for examination results. Minor changes are proposed for greater accuracy and consistency.

Changes Made Since the Proposed Stage

Please detail any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication. Please provide citations of the sections of the proposed regulation that have been altered since the proposed stage and a statement of the purpose of each change.

In the response to comment from the Virginia Occupational Therapy Association, the Board adopted two changes in final amendments. In subsection A of section 110 on delegation to unlicensed occupational therapy personnel, the phrase “discretionary aspects of the” were added in subdivision 2 to ensure that OT’s could delegate certain tasks relative to make an initial assessment or evaluation, provided those tasks are non-discretionary and do not require a clinical decision and do not constitute the exercise of professional judgment. In subdivision 3 of that subsection, the phrase “appropriately trained” was added to ensure that the occupational therapist has the responsibility for delegation to persons who are appropriately trained for that level of tasks and can be properly and safely performed by such unlicensed persons.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

On August 2, 2002, the Board of Medicine adopted final amendments to 18 VAC 85-80-10 et seq., Regulations Governing the Practice of Occupational Therapy.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law

Chapter 24 establishes the general powers and duties of health regulatory boards including the responsibility to promulgate regulations, levy fees, administer a licensure and renewal program, and discipline regulated professionals.

§ 54.1-2400. General powers and duties of health regulatory boards.--The general powers and duties of health regulatory boards shall be:

- 1. To establish the qualifications for registration, certification or licensure in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.*
- 2. To examine or cause to be examined applicants for certification or licensure. Unless otherwise required by law, examinations shall be administered in writing or shall be a demonstration of manual skills.*
- 3. To register, certify or license qualified applicants as practitioners of the particular profession or professions regulated by such board.*

4. *To establish schedules for renewals of registration, certification and licensure.*
5. *To levy and collect fees for application processing, examination, registration, certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the Department of Health Professions, the Board of Health Professions and the health regulatory boards.*
6. *To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 and Chapter 25 of this title.*
7. *To revoke, suspend, restrict, or refuse to issue or renew a registration, certificate or license which such board has authority to issue for causes enumerated in applicable law and regulations.*
8. *To appoint designees from their membership or immediate staff to coordinate with the Intervention Program Committee and to implement, as is necessary, the provisions of Chapter 25.1 (§ 54.1-2515 et seq.) of this title. Each health regulatory board shall appoint one such designee.*
9. *To take appropriate disciplinary action for violations of applicable law and regulations.*
10. *To appoint a special conference committee, composed of not less than two members of a health regulatory board, to act in accordance with § 9-6.14:11 upon receipt of information that a practitioner of the appropriate board may be subject to disciplinary action. The special conference committee may (i) exonerate the practitioner; (ii) reinstate the practitioner; (iii) place the practitioner on probation with such terms as it may deem appropriate; (iv) reprimand the practitioner; (v) modify a previous order; and (vi) impose a monetary penalty pursuant to § 54.1-2401. The order of the special conference committee shall become final thirty days after service of the order unless a written request to the board for a hearing is received within such time. If service of the decision to a party is accomplished by mail, three days shall be added to the thirty-day period. Upon receiving a timely written request for a hearing, the board or a panel of the board shall then proceed with a hearing as provided in § 9-6.14:12, and the action of the committee shall be vacated. This subdivision shall not be construed to affect the authority or procedures of the Boards of Medicine and Nursing pursuant to §§ 54.1-2919 and 54.1-3010.*
11. *To convene, at their discretion, a panel consisting of at least five board members or, if a quorum of the board is less than five members, consisting of a quorum of the members to conduct formal proceedings pursuant to § 9-6.14:12, decide the case, and issue a final agency case decision. Any decision rendered by majority vote of such panel shall have the same effect as if made by the full board and shall be subject to court review in accordance with the Administrative Process Act. No member who participates in an informal proceeding conducted in accordance with § 9-6.14:11 shall serve on a panel conducting formal proceedings pursuant to § 9-6.14:12 to consider the same matter.*

12. *To issue inactive licenses and certificates and promulgate regulations to carry out such purpose. Such regulations shall include, but not be limited to, the qualifications, renewal fees, and conditions for reactivation of such licenses or certificates.*

In addition to provisions in § 54.1-2400 which authorizes the Board to set qualifications and standards for licensure, the Code provides a mandate for licensure:

§ 54.1-2956.1. Powers of Board concerning occupational therapy.

The Board shall be empowered to take such actions as may be necessary to ensure the competence and integrity of any person who claims to be an occupational therapist or who holds himself out to the public as an occupational therapist, and to that end it may license practitioners as occupational therapists.

§ 54.1-2956.5. Restriction of titles.

It shall be unlawful for any person not holding a current and valid license from the Board to claim to be an occupational therapist or to assume the title "Occupational Therapist," "Occupational Therapist, Licensed," "Licensed Occupational Therapist," or any similar term, or to assume the designations "O.T." or "O.T.L." However, a person who has graduated from a duly accredited educational program in occupational therapy shall be exempt from the preceding prohibition until he has taken and received the results of any examination required by the Board or until one year from the date of graduation, whichever occurs sooner. This section shall not be construed to prohibit any person operating under the supervision of an occupational therapist pursuant to such requirements as may be imposed by the Board from claiming to practice occupational therapy or from using the title "Certified Occupational Therapy Assistant" or any variation thereof, or from assuming the designations "O.T.A." or "C.O.T.A."

The Assistant Attorney General who provides counsel to the Board of Medicine has provided a letter of assurance that the amended regulations are consistent with statutory law.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

Licensed occupational therapists and health care facilities often have a dilemma about what tasks constitute the practice of occupational therapy and what tasks may be appropriately delegated. The purpose of the amended regulation is to provide more specificity about delegation, emphasizing the responsibility of the licensee for the patient and the outcome of treatment. While the amended regulation is specific enough to prohibit the initial assessment, evaluation or development of a treatment plan, it is general enough to permit delegation of tasks based on the knowledge and skills of the unlicensed assistant. It also requires that delegated tasks or procedures must be communicated on a patient-specific basis with specific, clear instruction and expectations.

Since the licensed occupational therapist is responsible for the unlicensed personnel who work under his supervision, he must use his judgment about whether a task can safely and properly be

performed. No delegation of tasks may occur if such delegation may jeopardize the health, safety and welfare of the patient. By providing greater regulatory clarity on delegation, the Board intends to protect patients from inappropriate treatment by unlicensed, unsupervised individuals engaged in activities that may be interpreted as the licensed practice of occupational therapy.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement of the regulatory action's detail.

The board is recommending amendments to its regulations for the licensure of occupational therapists in order to address concerns about the adequacy of supervision for unlicensed assistants and to provide greater clarity on appropriate delegation of tasks. An amendment will also clarify for applicants the time period in which they may practice prior to getting the results of the licensure examination.

Issues

Please provide a statement identifying the issues associated with the final regulatory action. The term "issues" means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The primary issue that arose in the review of these regulations related to the appropriate use of unlicensed assistants in practice. The Code of Virginia permits practice by unlicensed assistants but also restricts the practice of occupational therapy as defined in § 54.1-2900 to persons who hold a license from the Board. Licensees often have a dilemma about what tasks constitute practice and what tasks may be appropriately delegated. By further specifying the regulation on supervision and delegation of tasks to unlicensed persons, the Board intends to provide greater clarity and protection for the public.

Advantages and disadvantages to the public:

There are no disadvantages to patients receiving occupational therapy services; they are better protected by more specific rules on delegation of tasks to unlicensed persons. Amended regulations will make it clear that the initial assessment of a patient and the development of a treatment plan shall only be done by the licensed OT. Only those routine tasks that can properly and safely be performed by unlicensed personnel can be delegated and shall be delegated on a patient-specific basis. The licensed individual remains responsible for the services provided and for the treatment of the patient.

Advantages and disadvantages to the agency or the Commonwealth:

There are no disadvantages to the agency; the amended regulation does not impose a new responsibility on the Board and does not involve additional cost or staff time. In part, the amended regulation is intends to clarify certain sections that have generated phone calls and questions to staff. If the Board is successful in clarifying those provisions, the agency could benefit from fewer inquiries from applicants and licensees.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

Proposed regulations were published in the Virginia Register of Regulations on April 22, 2002. Public comment was requested for a 60-day period ending June 21, 2002. A Public Hearing before the Advisory Board on Occupational Therapy was held on May 9, 2002, at which time there was comment from one person on the proposed regulations under consideration by the Board.

1) Alexander Macaulay, speaking for the Virginia Occupational Therapy Association (VOTA) at the hearing, expressed concern about certain provisions in the amended section on delegation to unlicensed occupational therapy. For the Certified Occupational Therapy Assistants (COTA's), the recommended rules on delegation may be too restrictive; for occupational therapy aides, the rules may not be narrow enough. COTA's are trained to conduct certain aspects of the initial assessment and evaluation and participate in the development of a treatment plan. For aides, there may be too much latitude in delegation of certain tasks.

Board response:

The Advisory Board agreed to the insertion of language to allow delegation of the non-discretionary aspects of the initial assessment, evaluation and development of a treatment plan. It also recommended that the phrase "appropriately trained" be inserted before "unlicensed occupational therapy personnel" to help distinguish between those who have certification as COTA's and the aides who have on-the-job training. The VOTA supports those amendments to the proposed regulations.

2) The Board also received written comment from the American Occupational Therapy Association. The comments are summarized as follows:

- The AOTA was primarily concerned about the lack of distinction between occupational therapy assistants and aides as being vastly different types of employees. It is their contention that the failure of the regulations to distinguish between the two in definition and provisions for delegation will allow aides to be used inappropriately and could endanger patients. To remedy the problem, the AOTA suggested definitions be added for "occupational therapy assistant" and "aide." If the Board does not have the authority to specify a distinction in regulation, the AOTA suggests that a change in the statute is necessary to authorize licensure or state certification of assistants.

- Amendments to the section on practice by a graduate awaiting examination results were supported, but it was suggested that a requirement for direct and appropriate supervision by a licensed occupational therapist be added.
- Under the amended rules for supervisory responsibilities, the AOTA commented that the roles and limitations of occupational therapy assistants and aides have not been delineated. Tasks described under this section are not appropriately delegated to an aide. The AOTA also believes that tasks requiring a clinical decision or the exercise of professional judgment could be delegated to an occupational therapy assistant.

Board response:

- Regulations of the Board for licensure of occupational therapy are authorized by Chapter 29 of Title 54.1. While “occupational therapist” is a title recognized by the Code, the title “certified occupational therapy assistant” is not. Anyone working under that title is an unlicensed person assisting the occupational therapist, and the Board cannot create a scope of practice of such individuals. The study conducted by the Board of Health Professions found no compelling reason to license certified occupational therapy assistants (COTA’s), so there is no current proposal to change the law.
- The amendments on practice by a graduate awaiting the results of an examination (section 41) are intended to reflect the statutory language for provisional practice found in § 54.1-2956.5.
- Without statutory authority to regulate COTA’s, the Board has to consider all assistants/aides as unlicensed persons. Amendments to the proposed regulation are intended to clarify that an OT cannot delegate the discretionary aspects of the initial assessment and evaluation and that tasks shall only be delegated to appropriately trained personnel.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or crosswalk - of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.

Throughout the regulation, the word “licensure” has been inappropriately used and is being correctly replaced with the word “license.”

18 VAC 85-80-26. Fees.

Fees are currently established in section 120 of these regulations. For consistency with other regulations under the Board, it is proposing to move the regulations on fees to Part I. General Provisions. Fees are identical to those currently in effect.

18 VAC 85-80-40. Educational requirements.

An amendment in subsection C would clarify that “current” certification by NBCOT is required for those applicants who do not meet the educational requirements prescribed in this section.

18 VAC 85-80-41. New section on practice while awaiting examination results.

Based on a recommendation from staff members who often receive inquiries from applicants, the Board proposes that a new section be added to clarify the conditions by which an applicant can practice occupational therapy while waiting the examination results, consistent with § 54.1-2956.5 of the Code of Virginia.

18 VAC 85-80-60. Practice requirements.

The “active practice” of occupational therapy is defined in section 10. The proposed amendment in section 60 eliminates a redundant and unnecessary phrase.

18 VAC 85-80-70. Biennial renewal of licensure.

The “active practice” of occupational therapy is defined in section 10. The proposed amendment in section 60 eliminates a redundant and unnecessary phrase.

18 VAC 85-80-110. Supervisory responsibilities.

Amendments to regulations are recommended to clarify the supervisory responsibilities in response to concerns about the appropriate functions for unlicensed assistive personnel. The Board has adopted provisions that will ensure that the licensed occupational therapist is responsible and accountable for the services provided by occupational therapy personnel under his supervision. The O.T. may not delegate the discretionary aspects of an initial assessment, evaluation or the development of a treatment plan. Clinical decision and tasks that require professional knowledge and judgment should not be delegated to unlicensed assistants.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

In its analysis of the regulatory action, the agency has determined that there is no potential impact on the institution of the family and family stability and would not result in an increase or decrease in disposable family income.